Maskimi Sdn Bhd v Lee Poh Heng

HIGH COURT (KUALA LUMPUR) — SUIT NO D6-22-803 OF 1999
REKHRAJ J
11 MAY 2000

Civil Procedure *— Judgments and orders — Judgment in default of appearance — Setting aside of — Whether breach of r 56 of Legal Profession (Practice and Etiquette) Rules 1978 rendered judgment irregular — Whether defence on merits established*

The plaintiff sued the defendant for breach of the agreement entered into between them for the sale and purchase of some shares in the defendant's company. Upon the default of appearance by the defendant, the plaintiff obtained a judgment in default against the defendant. The defendant applied to have the judgment set aside and the SAR granted the order on the ground that the defendant had shown a defence on the merits. The defendant also contended that the judgment was irregular as the plaintiff's then solicitors had breached r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. The plaintiff appealed.

Held, allowing the appeal:

(1) Rule 56 is not a substantive rule of law to be complied under the Rules of the High Court 1980 ('the RHC'), thus breach by itself does not in anyway render the judgment as irregular (see pp 607H–608A).

(2) Service was properly and personally effected on the defendant, in accordance with O 10 r 1 of the RHC, who acknowledged receipt thereof. Thus his failure to enter appearance warrants the entering of default judgment as having been regularly obtained. A regularly obtained judgment can only be set aside at the discretion of the court if there appears to be a defence showing merits which in this case the defendant had failed to establish (see p 608A–B).

[Bahasa Malaysia summary

Plaintif telah mendakwa defendan untuk pelanggaran perjanjian yang dimasuki antara mereka untuk jual beli saham-saham di dalam syarikat defendan. Di atas ketidakhadiran defendan, plaintif telah memperolehi penghakiman terhadap defendan. Defendan telah memohon agar penghakiman tersebut diketepikan dan penolong kanan pendaftar telah memberikan perintah tersebut atas dasar bahawa defendan telah menunjukkan pembelaan atas merit. Defendan juga menegaskan bahawa penghakiman tersebut adalah tidak teratur kerana peguam plaintif pada masa itu telah melanggar k 56 Kaedah-Kaedah Profesyen Undang-Undang (Amalan and Etika) 1978. Plaintif telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Kaedah 56 bukanlah peraturan undang-undang substantif yang kena dipatuhi di bawah Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dengan itu pelanggaran dengan sendiri tidak menjadikan penghakiman tidak teratur (lihat ms 607H–608A).

(2) Penyampaian telah dibuat dengan wajar dan dilaksanakan secara peribadi ke atas defendan, menurut A 10 k 1 KMT, yang telah mengakui penerimaannya. Dengan itu, kegagalannya untuk memasuki kehadiran menjustifikasikan kemasukan penghakiman ingkar sebagai diperolehi secara teratur. Suatu penghakiman yang diperolehi secara teratur hanya boleh diketepikan atas budi bicara mahkamah jika terdapat pembelaan yang menunjukkan merit di mana di dalam kes ini, defendan telah gagal untuk membuktikan (lihat ms 608A–B).]

Notes

For a case on judgment in default of appearance, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2766.

Cases referred to

Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd [1988] 1 MLJ 33 (refd)

Bank Bumiputra (M) Bhd v Majlis Amanah Rakyat [1979] 1 MLJ 23 (refd)

Fira Development Sdn Bhd v Goldwin Sdn Bhd [1989] 1 MLJ 40 (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 32 (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 r 56

Rules of the High Court 1980 O 10 r 1, O 33(2)

HM Ooi (*Logan Sabapathy & Co*) for the plaintiff/appellant.

Yusman Badar (*Amir Faezal Norzela & Chong*) for the defendant/respondent.

Rekhraj J: Pursuant to the sale and purchase agreement dated the 7 August 1995; and entered into between the plaintiff; as the purchasers on the one part; and the defendant as the vendor on the other part ('the sale and purchase agreement') wherein the vendor as the owner and as beneficial owner agreed to sell 1,530,000 shares held by him in Hamsay Glass Sdn Bhd ('the company') at a purchase consideration of RM6,340,000 ('the purchase price') upon terms and conditions as provided therein — inter alia, under cl 8.2.3 upon a warranty representation of the defendant ('the vendor'), that the company shall have a *minimum profits* for a period of three years effective 30 June 1997 as follows:

(a) for the year ending 1997 RM2m; A

(b) for the year ending 1998 RM2m; and

(c) for the year ending 1999 RM2m.

Further, by cl 8.3 of the sale and purchase agreement, the defendant undertook to indemnify and keep indemnified the purchasers against all B losses arising out of all or any breach of warranties, undertakings or covenants and or misrepresentations. In addition to the above, the defendant also by cl 8.9 of the sale and purchase agreement warranted: 'The vendor further warrants and undertakes that in the event the *minimum profits of the company for the period of three years from the date of this agreement* (dated 7 August 1995) is less than as provided for in cl 8.2.3 (hereinabove) — then C the vendor shall pay to the purchaser the difference between the profits made by the company for the three-year period; the amount specified in cl 8.2.3; and which amount by way of *payment shall be made by the vendor* to the purchaser *at such time as the purchaser may at its absolute discretion determine* (or make).'

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The company suffered losses for the period of three years from the date of the agreement as provided for under cl 8.9; and the plaintiff therefore claimed against the defendant in the sum of RM5,225,147 being the losses suffered worked up as at 30 June 1998, together with interest thereon and costs.

The plaintiff (before the issuance of the writ dated 24 March 1999) had E on 4 November 1998, through their previous solicitors written to the defendant of the breach on the part of the defendant and demanded the defendant the said sum of RM5,225,147 to be paid within 14 days of the date thereof failing which legal proceedings shall be instituted against him.

To this demand, the defendant's solicitors M/s Amir, Faezal, Norzela F & Chong by their letter dated 10 November 1998, replied:

(a) our client disputes the claim as specified in your letter; and

(b) we wish to inform that should your client intend to commence any proceedings in this matter, we have instructions to accept service of process. G

The plaintiff proceeded to issue the writ; and instead of having it served on the solicitors as requested for in the letter of M/s Amir, Faezal, Norzela & Chong, served it personally on the defendant on 6 April 1999, in accordance with O 10 r 1 of the Rules of the High Court 1980; and upon the default of appearance by the defendant, and upon perusal of the H affidavit of service of the writ of summons of claim and the certificate of non-appearance having been filed; and the court being satisfied that the plaintiff claim was a liquidated sum, entitling judgment in default, the court entered judgment on 20 April 1999, against the defendant; thereby making it a *regularly obtained judgment*; and a regularly obtained judgment can only be set aside upon an application, provided the affidavit in support of the I summons to set aside shows that the defendant has a valid defence on merits.

A After the entering of the judgment, the defendant then attempted to enter an *unconditional appearance*, and by this act of unconditional appearance had elected to waive the argument of any on irregularity in the service. The defendant then filed a summons in chambers on 25 June 1999, praying for:

B (i) That the service of the plaintiff writ of summons on the defendant be set aside and with it the judgment in default entered on 20 April 1999; and

(ii) In the alternative, the defendant be granted leave to apply out of time to have the said judgment set aside;

C In the defendant's written submissions, the defendant took the issue:

(a) whether the said judgment was entered irregularly; and if so, then the application to set aside was to be granted ex debito justiacie; and

(b) but if the judgment so entered was a regular judgment, then whether the defendant has set out sufficient evidence before the court to
D show that he had a prima facie defence on the merits to the plaintiff's claim.

The defendant's submission on irregularity of judgment was a non-starter, as the test as to whether a judgment in default has been regularly obtained has been laid out in the Supreme Court decision in the case of *Fira*
E *Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 at p 41, where his Lordship Lee Hun Hoe CJ stated:

> 'where the judgment is entered on the failure of the defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment' by adopting the
F ratio of Lord Atkins in *Evans v Bartlam* [1937] AC 473, 'that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke ... where that has only been obtained by a failure to follow any of the rules of procedure.'

It is clear that the defendant's contention of irregularity hinges on the only contention that the plaintiff's then solicitors had breached r 56 of the Legal
G Profession (Practice & Etiquette) Rules 1978 which reads:

> where the name of the advocate and solicitor or his firm appears on the court record or the fact of representation is known to the other side, no advocate or solicitor representing the other party to the proceedings shall enter judgment by default against the client of the first-named advocate and solicitor ... unless
H he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

To me r 56 is a rule to regulate the personal relationship in the legal profession as said by his Lordship Zakaria Yatim J (as he then was in the case of *Asia Commercial Finance (M) Bhd v Bank Bumiputra (M) Bhd*
I [1988] 1 MLJ 33; and is not a substantive rule of law to be complied under the Rules of the High Court; and any breach thereof, if any, is a cause of reference to the disciplinary board of the Bar Council.

Breach by itself does not in anyway render the judgment as irregular. In the case, service was properly and personally effected on the defendant who acknowledged receipt thereof; and his failure to enter appearance (or where the writ is not properly served, but enters an unconditional appearance in the action; the writ then shall be deemed to have been duly served on him) warrants the entering of default judgment, as having been regularly obtained; and a regularly obtained judgment can only be set aside at the discretion of the court if there appears to be a defence showing merits.

The test to be applied as to whether the judgment in default is regularly entered is set out as per his Lordship Raja Azlan Shah CJ (Malaya), as he then was, [presently His Royal Highness) in the case of *Bank Bumiputra (M) Bhd v Majlis Amanah Rakyat* [1979] 1 MLJ 23 as (at p 24):

> The rule gives the court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits.

Again his Lordship Jemuri Serjan CJ (Borneo) in the Supreme Court decision of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 321 said at pp 321–322:

> To use common and plain language, the application must show that his defence is not a sham defence, but one that is prima facie, raising serious issues as a bona fide reasonable defence ... . It involves a mental process that goes through the mind of the judge when making a decision in any case, weighing the evidence of the litigant against that of another on the facts alleged ...

With these propositions on record, the question now begs to be asked is — Has the defendant shown a defence on the merits in his affidavit? The gist of the defendant's purported defence is contained in paras 21 to 24 of the defendant's affidavit in largely trying at its best to interpret cll 8.2.3 and 8.9 of the sale and purchase agreement, in a manner to import that the plaintiff's claim was premature to crystalise only on 30 June 2000; and by an innuendo, suggesting that the profits represented could not be targeted by reasons of his having been removed as a director of the company, in which he held shares and sold to the plaintiff; and that the result of his removal from the company has prejudiced him as a party to the agreement, and submitting that the interpretation of the cll 8.2.3 and cl 8.9 be interpreted restrictively to read that the plaintiff's claim was to mature only after 30 June 1999.

The plaintiff on the other hand submitted that the words used in the document (sale and purchase agreement cll 8.2.3 and 8.3 read together with cl 8.9) must be construed in their ordinary and natural meaning as being without any ambiguity. In other words, the meaning of the words used in the document if read as a whole, conveys the one and the only intent, without any ambiguity, and it is not for the judges to invent or read fancies or ambiguities, as an excuse to put the matter for trial; instead be brave enough to attack that issue summarily and decide that as a point of law under O 33(2) of the Rules of the High Court 1980.

A Having read the clauses in the context, there clearly appears to be no ambiguity at all, the meaning is clear, the defendant ('the vendor') warranting and undertaking that in the event of the profits being less than the minimum profits for a period of three years from the date of the agreement dated 7 August 1995; the vendor shall pay to the purchaser the difference between the profits made by the company for the three-year B period, and which payments shall be made by the defendant at the absolute discretion and at such time of the *demand of the purchaser*. There is no evidence produced to the court by the defendant in rebuttal that profits, if any, have been made, except to traverse that the profits could not be realised; for reasons of his having been removed from the company as a C Managing Director on or about 14 October 1998.

Reading the sale and purchase agreement, no where was it provided or reserved by the defendant that the minimum profit formula was solely dependent upon the defendant remaining or continue to remain as the managing director of the company.

D The plaintiff claim herein is for the monies due for the period expiring 30 June 1998, whilst the defendant as a managing director was only removed on 14 October 1998, and therefore the plaintiff claim is well within the period of the defendant's representations, warranties and indemnities.

Taking all these factors into consideration, the defendant had failed to establish the test of defence on merits. I accordingly allowed the appeal on E that part of the order of the senior assistant registrar that there was an issue of a defence on merit.

I am satisfied that the defendant has no defence at all on merits. I also awarded costs of RM2,000 to the plaintiff.

Appeal allowed.

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Reported by Wong Siok Chin

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